

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

LUIS ENRIQUE VAZQUEZ-HERNANDEZ,	Case No. 3:14-cv-00344-MMD-VPC
Petitioner,	ORDER
v.	
STATE OF NEVADA,	
Respondents.	

This habeas action comes before the Court for initial review.

The papers presented are subject to multiple substantial defects.

First, petitioner did not properly commence the federal action by either paying the filing fee or submitting a properly completed pauper application. Under Local Rule LSR 1-1, a petitioner must use the Court's required pauper application form to seek pauper status. Under Local Rule LSR 1-2, a petitioner must attach both a financial certificate authorized by an appropriate correctional official and a statement of his inmate trust account for the prior six (6) months. Petitioner did not use the required pauper form, and he did not include the required financial certificate.

Second, petitioner did not use the required form for a petition challenging a state court conviction. Under Local Rule LSR 3-1, a petitioner seeking to challenge a state court conviction must use the Court's required form for a petition under 28 U.S.C. § 2254. Petitioner instead used a form for a motion under 28 U.S.C. § 2255 that would be used by a person seeking to challenge a federal conviction and sentence.

1 Third, petitioner may not proceed against the only respondent named, the State  
2 of Nevada. Petitioner may not bring a civil action in federal court directly against the  
3 State of Nevada because of the state sovereign immunity recognized by the Eleventh  
4 Amendment, regardless of the relief sought. *E.g., Pennhurst State School & Hospital v.*  
5 *Halderman*, 465 U.S. 89, 101-02 (1984).<sup>1</sup>

6 Fourth, petitioner otherwise did not name a proper respondent. Petitioner is  
7 seeking to challenge a Nevada state justice court misdemeanor conviction on a fully-  
8 expired sentence while currently in custody in an Arizona facility apparently for federal  
9 immigration authorities. The Court is not called upon to express a definitive opinion as  
10 to who the proper respondent should be in that context, as the Court need note here  
11 only that petitioner clearly has not named a proper respondent. See 1976 Advisory  
12 Committee Notes to Rule 2(b) of the Rules Governing Section 2254 Cases (discussing  
13 the possible respondents for various possible situations).

14 Fifth, while petitioner signed the declaration on the pleading that he filed, he did  
15 not sign the pleading itself. He must sign both the pleading and the accompanying  
16 declaration.

17 Due to these multiple defects, the pauper application will be denied without  
18 prejudice and the petition in this improperly-commenced action will be dismissed without  
19 prejudice. It does not appear that a dismissal without prejudice to a new federal action  
20 would materially impact adjudication of any issue in a promptly filed new action or  
21 otherwise cause substantial prejudice.<sup>2</sup>

22  
23 <sup>1</sup>To the further extent that petitioner names the United States of America as a  
24 respondent, he similarly cannot proceed directly against the federal sovereign due to  
25 sovereign immunity.

26 <sup>2</sup>The papers presented and the available online state court records reflect the  
27 following. Petitioner challenges his December 5, 2008, state justice court misdemeanor  
28 conviction, pursuant to a guilty plea, of possession of drug paraphernalia, in violation of  
N.R.S. 453.566. Petitioner was sentenced to seven days time served, such that the  
sentence necessarily was fully expired from the very outset over five years ago.  
Petitioner did not file an appeal from the conviction.

In 2012, petitioner filed a petition to seal records in the justice court. It appears  
from the papers presented that the state courts adjudicated the petition as directed to a  
(fn. cont...)

1 It is therefore ordered that the application (dkt. no. 1) to proceed *in forma*  
 2 *pauperis* is denied without prejudice and that this action shall be dismissed without  
 3 prejudice.

4 It is further ordered that a certificate of appealability is denied. Jurists of reason  
 5 would not find the dismissal of this improperly-commenced action to be either debatable  
 6 or incorrect, given the multiple substantial defects presented and the absence of any  
 7 substantial collateral prejudice to petitioner from the dismissal without prejudice.

8  
 9 

---

 (...fn. cont.)

10 justice court conviction based upon a September 27, 2010, guilty plea of misdemeanor  
 11 domestic battery. (See "Addendum C," dkt. no. 1-2, at electronic docketing page 20.)  
 12 The state justice court denied the petition and denied petitioner's motion for  
 13 reconsideration. The state district court affirmed the denial of the motion for  
 reconsideration. When petitioner sought to appeal to the Supreme Court of Nevada, that  
 court dismissed the appeal, in No. 64345 in that court, because the denial of a motion  
 for reconsideration was not appealable under state law and the state district court in any  
 event had final appellate jurisdiction over a case arising in the justice court.

14 It thus would appear from the foregoing that it is probable that: (a) there is no  
 15 federal habeas jurisdiction to collaterally review the December 5, 2008, misdemeanor  
 16 conviction because petitioner no longer was in custody under the conviction after the  
 17 seven-day sentence expired (see, e.g., *Maleng v. Cook*, 490 U.S. 488 (1989)); (b) the  
 one-year federal limitation period putatively expired on its face over five years ago; and  
 (c) none of the claims in the federal papers challenging the conviction on the merits  
 have been exhausted by being fairly presented through to a final decision on the merits  
 by the highest court available.

18 The Court further notes that, in his federal papers, petitioner seeks to challenge  
 19 his conviction on the basis that he was not advised of the immigration consequences of  
 20 the conviction and thus was denied effective assistance of counsel under the Sixth  
 Amendment. However, the decision that this argument indirectly invokes, *Padilla v.*  
 21 *Kentucky*, 559 U.S. 356 (2010), is not retroactively applicable to convictions that  
 22 became final prior to the March 31, 2010, date of that decision. (See *Chaidez v. United*  
 23 *States*, 133 S.Ct. 1103 (2013).) Moreover, the minutes from the plea colloquy reflect  
 that petitioner was advised of and waived his right to, *inter alia*, counsel when he  
 entered his plea to the misdemeanor conviction. (See dkt. no. 1-1, at 29.) While  
 petitioner maintains that the interpreter failed to advise him of the immigration  
 consequences, it is unlikely that a defendant can waive his right to counsel and then at  
 least successfully complain that he was not properly advised by the interpreter.

24 In all events, the dismissal of this improperly-commenced action without  
 25 prejudice will not materially impact the adjudication of any such issues in a promptly  
 filed new federal action. The resolution of the foregoing issues will not turn upon the  
 filing date of this particular action under this particular docket number.

26 Petitioner also refers to a pending proceeding in No. 11-73907 in the Ninth  
 27 Circuit. That proceeding appears to be an appeal from a decision of the Board of  
 Immigration Appeals and thus has no direct relevance to this proceeding or the  
 discussion herein.

28 Nothing herein directs petitioner to file any proceeding in any court.

1 The Clerk of Court shall send petitioner two (2) copies each of a pauper  
2 application form for a prisoner and a § 2254 petition form, along with one (1) copy of the  
3 instructions for the forms and the papers that he submitted herein.

4 The Clerk shall enter final judgment accordingly, dismissing this action without  
5 prejudice.

6 DATED THIS 3<sup>rd</sup> day of July 2014.

7  
8 

9 MIRANDA M. DU  
10 UNITED STATES DISTRICT JUDGE  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28